

# ***LEGAL ESOTERICA***

by Gary A. Weissman

## **The Northwest Ordinance**

Yale Law Professor Akhil Reed Amar<sup>1</sup> asserts that America has a “Symbolic Constitution,” a canon of documents outside the Constitution that are “privileged sources of meaning, inspiration, and guidance” in interpreting the Constitution.<sup>2</sup> According to Prof. Amar, these iconic documents comprise a network of six interconnected texts: (1) The Declaration of Independence; (2) *The Federalist*; (3) the Northwest Ordinance; (4) Lincoln’s Gettysburg Address; (5) the Warren Court’s *Brown v. Board of Education* decision; and (6) Dr. Martin Luther King, Jr.’s “I Have a Dream” speech.<sup>3</sup>

“Hmm,” you might say to yourself, “I get the Declaration of Independence and *The Federalist*, as precursors to the Constitution; I can kind of wrap my head around how *Brown v. the Board of Education*<sup>4</sup> dramatically extended the reach of civil rights protections against state infringement; and I recognize how the Gettysburg Address and King’s ‘Dream’ speech both invoked the Declaration of Independence and the language of the Constitution; but if the dude is going to elevate just six documents to the status of the Symbolic Constitution, how does the Northwest Ordinance – that relic of the Articles of Confederation – possibly belong with the other five?”

That’s a fair question, ... and there’s a good answer. Let’s begin at the beginning:

### **WHY DID IT GET ENACTED?**

Adopted in July, 1787, the Northwest Ordinance was the last, and most important, accomplishment of the Confederation Congress.<sup>5</sup> In The 1983 *Treaty of Paris*, ending the

Revolutionary War, Britain recognized the independence of its former 13 colonies as the United States of America and ceded to that entity all of its territory south of the Great Lakes, west of Pennsylvania, north of the Ohio River, and east of the Mississippi River.<sup>6</sup> -- essentially what came to be the Big 10 turf.<sup>7</sup>

Initially, the Continental Congress planned to let the original colonies administer their claims to unsettled territory beyond the Appalachians. During the Pre-Independence Era, all of the original colonies (except for Maryland, Delaware, and New Jersey, which were hemmed in on the west by other colonies) claimed that their boundaries extended from the Atlantic to the Pacific; however, many of their claims conflicted. Maryland and New Jersey refused to ratify the Articles of Confederation for four years because of the dispute over western lands. Those two states finally signed on in 1781 when the states with western claims north of the Ohio River, namely Virginia, New York, Massachusetts, and Connecticut,<sup>8</sup> agreed to transfer their claims over the land beyond the Allegheny Mountains to the Federal Government.<sup>9</sup> Thus, the future Big Ten turf became territory of the central government, which then had to figure out what to do with it.

The Constitution didn't make any provision for adding new territory to the United States, but in 1789 the first Congress under the new Constitution reaffirmed the Northwest Ordinance with only a minor adjustment.<sup>10</sup>

### **SO, WHAT DID THE ORDINANCE PROVIDE?**

The Ordinance (as amended by the first constitutional Congress) provided that (1) the territory would eventually be carved into no fewer than three and nor more than five territories,<sup>11</sup>

which would have a three-step process for becoming states on equal footing with the original 13 States;<sup>12</sup> (2) granted freedom of navigation on all the tributaries of the Mississippi and St. Lawrence Rivers;<sup>13</sup> (3) guaranteed certain civil liberties (freedom of religion; *habeus corpus*, trial by jury, compensation for governmental taking of property, judicial proceedings according to the common law, and freedom of contract);<sup>14</sup> (4) encouraged public education by requiring a portion of revenues to be reserved for public schools;<sup>15</sup> (5) prohibited slavery and other involuntary servitude;<sup>16</sup> and (6) proscribed the taking of lands from Native Americans.<sup>17</sup>

### **HOLD ON THERE, Y'ALL**

“Wait just a cotton-pickin’ minute,” you should be saying to yourself, “why would a Southern-fried Congress (with Southerners occupying 47% of the seats in the House of Representatives and 50% of the Senate seats)<sup>18</sup> vote for a law that prohibited slavery in the new, Northwest Territory?” Indeed!

Well, no one has yet uncovered any documentary evidence about it, but there are a couple of theories: One is that it was a way that the powerful tobacco-planters could make sure that there would be no competition from the new states north of the Ohio River (tobacco being so labor-intensive in the late 18<sup>th</sup> century that it would have been impossible to cultivate it without slave labor).<sup>19</sup>

The other theory is that there was a secret deal cut between the Confederation Congress (meeting in the summer of 1787 in New York) and the Constitutional Conventioneers (meeting that same summer in Philadelphia) that included a *quid pro quo*: Southerners would vote for the Northwest Ordinance, including its prohibition of slavery; and, in exchange, Northerners would

agree to the “1808 clause” in the Constitution (preventing Congress from ending the slave trade until 1808),<sup>20</sup> by which time, the Southerners figured, the settlers of the new Northwest Territory would be southerners who, though not slaveholders themselves, would be opposed to the growing abolition movement in the North.<sup>21</sup> A comparison of the members of the 1787 Eighth Confederation Congress with the delegates to the Constitutional Convention shows that there was an overlap of about a dozen, including James Madison, so such a secret agreement might just have been possible.<sup>22</sup>

### **AND THE BIG DEAL IS...?**

“All right,” one might conclude, “so the Ordinance established a framework for the eventual admission of five states and abolished slavery in places where neither cotton nor tobacco could grow very easily. It also made a big promise not to push Indians in the Northwest Territory off their lands, a promise that the United States openly flouted. It still does not explain why the Ordinance merits a place in the Symbolic Constitution.”

Well, for one thing, the United States Supreme Court deems the Northwest Ordinance important enough to have cited it 125 times to undergird whatever decision (or dissent) the Justices were expounding.<sup>23</sup> Some of those cases were “biggies,” including *Reynolds v. Sims*<sup>24</sup> (one person, one vote); *City of Boerne v. Flores*<sup>25</sup> (free exercise of religion); *Kilo v. City of New London*<sup>26</sup> (eminent domain); and *Boumediene v. Bush*<sup>27</sup> (applicability of *habeus corpus* rights to Guantánamo detainees).

People who grew up in the Northwest Territory played crucial roles during and after the Civil War: Abraham Lincoln (Illinois), Ulysses S. Grant (Ohio and Illinois); Salmon P. Chase, Sec. Of the Treasury and later Chief Justice (Ohio); General (later President) Rutherford B. Hayes (Ohio). And what was once the Ordinance's territory continued to nurture statesmen even in the 20<sup>th</sup> and 21<sup>st</sup> Centuries: Vice-President Hubert Humphrey, Vice-President Walter Mondale, and President Barack Obama.

Some remnants of the name of the Territory created by the Ordinance linger: Northwestern University in Evanston, Illinois, takes its moniker from the region it was founded to serve; and until 21<sup>st</sup> century acquisitions by Wells Fargo and Delta Airlines, Northwest Bank and Northwest Airlines, respectively, proudly paraded their logos in the Land of Sky Blue Waters.

More importantly, the Ordinance also played a pivotal role in American legal history: It laid down the template for governing new territories and admitting new states (including Minnesota); its Article VI provided the language for the Thirteenth Amendment (“Neither slavery nor involuntary servitude...”) abolishing slavery in the rest of the United States; it also presaged (by 177 years) proportional representation in state legislatures;<sup>28</sup> its Article 3 established the precedent for Federal aid to public education; and it granted to territorial citizens civil liberties that only subsequently appeared in the Bill of Rights and, 66 years later, through the 14<sup>th</sup> Amendment applied against States.<sup>29</sup>

Not bad for a little ol' Ordinance from the Continental Congress under the Articles of Confederation.

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## ENDNOTES

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1. Amar is the Sterling Professor of Law and Political Science at Yale. His book, *America's Constitution*, won the Silver Gavel Award from the American Bar Association.
  2. Akhil Reed Amar, *The Unwritten Constitution* (2012) at 247.
  3. *Id.* At 248.
  4. *Brown v. Board of Education*, 347 U.S. 483 (1954).
  5. The Continental Congress, which operated as the Government during the Revolutionary War, continued to call itself the Continental Congress once the Articles of Confederation were ratified in 1781. Historians refer to them as the Confederation Congresses, which had ten separate iterations between 1781 and 1788, all of them weak (because the States paid little attention to what the Congress said, did or requested), and many of them couldn't even generate a quorum.
  6. Eric Foner and John Garry, eds., *The Reader's Companion to American History* (1991).
  7. Ohio (Ohio State), Indiana (U. of Indiana and Purdue);, Illinois ( U. Of Illinois and Northwestern U.); Michigan (U. of Michigan and Michigan State); Wisconsin (U. of Wisconsin), and the eastern third of Minnesota (U. of Minnesota) – which is to say, before the Big 10 became, essentially, the Big 14, by adding Nebraska, Penn State, Rutgers, and Maryland.
  8. To put a fine point on it, Connecticut actually reserved 5,280 square miles of its claim in what is now northeastern Ohio, which it did not cede to Uncle Sam until 1800. Connecticut denominated that slice as “the Western Reserve,” which is why there is a Western Reserve University in Cleveland. *Wikipedia*, “Western Reserve.”
  9. Creighton University history, *online.creighton.edu*
  10. The Ordinance as adopted by the Confederation Congress conferred authority upon the Congress to oversee the administration of the new Northwest Territory; Congress under the new Constitution changed that so that the President, with the advice and consent of the Senate, would appoint the Governors and other Territorial officials. 1 U.S.C. xxxix.
  11. Article 5, Northwest Ordinance.
  12. The five territories which became states were Ohio, Michigan, Indiana, Illinois, and Wisconsin. The last of those territories to join the Union, Wisconsin, petitioned to be admitted with all of the residual territory from the Northwest Territory, which would have included the

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eastern third of Minnesota. But Congress determined that Wisconsin's western border would be the St. Croix instead of the Mississippi, thereby saving Duluth, St. Paul, and part of Minneapolis for the state-to-be of Minnesota. See Mark Stein, *How the States Got Their Shapes* (2008) at 301.

13. Article IV, Northwest Ordinance.

14. Articles I and II, Northwest Ordinance.

15. Article III, Northwest Ordinance.

16. Article VI, Northwest Ordinance.

17. Article III, Northwest Ordinance.

18. Rhode Island did not ratify the Constitution until 1790, so only 12 states had Senators in 1789, and six of them were slave-states (Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia). Article I, section 2, of the United States Constitution specified the number of Representatives each state would have in the first Congress.

19. Internet: *This Day in History*, "Northwest Ordinance of 1787."

20. Article I, section 9, United States Constitution.

21. Suggested by Don Fehrenbacher and Ward McAfree, in their book *The Slaveholding Republic* (2001).

22. *Wikipedia*, recapitulating data from the *Biographical Dictionary of the United States*..

23. Amar, *supra* note 2, at 258.

24. *Reynolds v. Sims*, 377 U.S. 533, 573 (1964).

25. *City of Boerne v. Flores*, 521 U.S. 507, 538 (1997), (Scalia, Concurring).

26. *Kelo v. City of New London*, 545 U.S. 469, 509-510 (2005), Thomas, Dissenting.

27. *Boumediene v. Bush*, 553 U.S. 723, 756 (2008).

28. See *Reynolds v. Sims*, *supra* note 24.

29. Amar, *supra* note 2, at 260-262.